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IN THE
Supreme Court of the United States

THE NEW YORK TIMES COMPANY, INC.; NEWSDAY, INC.;
THE TIME INCORPORATED MAGAZINE COMPANY;
LEXIS/NEXIS and UNIVERSITY MICROFILMS INTERNATIONAL,
Petitioners,

v.

JONATHAN TASINI; MARY KAY BLAKELY;
BARBARA GARSON; MARGOT MIFFLIN;
SONIA JAFFE ROBBINS and DAVID S. WHITFORD,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF *AMICI CURIAE* OF KEN BURNS, DORIS KEARNS GOODWIN, RICHARD N. GOODWIN, DAVID M. KENNEDY, DAVID MCCULLOUGH, JACK N. RAKOVE AND GORDON S. WOOD IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether a publisher's reproduction and distribution of its entire periodical not only in print, but also electronically, is privileged under the Copyright Act or instead infringes upon the copyright held by contributing freelance authors.

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INTERESTS OF *AMICI CURIAE*[1]

This brief *amici curiae* in support of petitioners is submitted by Ken Burns, Doris Kearns Goodwin, Richard N. Goodwin, David M. Kennedy, David McCullough, Jack N. Rakove and Gordon S. Wood ("*amici*"), pursuant to Rule 37 of the Rules of this Court.

Ken Burns is a filmmaker and author, widely known for his documentaries for public television. Mr. Burns' films include *The Civil War* and *Baseball*, each of which set records for public television viewership. Some of his other films include *Not for Ourselves Alone: The Story of Elizabeth Cady Stanton and Susan B. Anthony*; *Lewis and Clark: The Journey of the Corps of Discovery*; *The Congress*; *Frank Lloyd Wright*; *The Statue of Liberty*; *Brooklyn Bridge*; *Huey Long*; and *Thomas Jefferson*. In addition to his work as a documentarian and biographer, Mr. Burns has also collaborated on several books, including *Jazz: An Illustrated History*; *The Civil War: An Illustrated History*; and *Baseball: An Illustrated History*. Mr. Burns has been nominated twice for an Academy Award and has won numerous Emmy Awards, as well as other honors. Mr. Burns is an active member of the Society of American Historians.

Doris Kearns Goodwin is an historian, commentator and author, widely known for her historical perspectives on American politics and political figures. Ms. Kearns Goodwin is the author of numerous highly-acclaimed biographies, including the 1995 Pulitzer Prize-winning best seller, *No Ordinary Time: Franklin and Eleanor Roosevelt—The Home Front in World War II*. In addition, Ms. Kearns Goodwin has contributed numerous articles on historical, political and

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[1] Letters from all parties consenting to the filing of this brief have been filed with the Clerk of this Court. No counsel for a party authored this brief in whole or in part, and no person or entity other than *amici curiae*, or their counsel, made a monetary contribution to the preparation or submission of this brief.

cultural subjects to publications, including *The New York Times*, *The Atlantic Monthly*, *Life* and *Redbook*. She is a former professor of government at Harvard, and currently serves as a political commentator for NBC and the PBS program, *The News Hour with Jim Lehrer*.

Richard N. Goodwin is a political advisor and commentator as well as an historian and author. Mr. Goodwin served as a speech writer to President Lyndon Johnson and as an advisor to President John F. Kennedy. He has published several successful books on political subjects, as well as contemporary American life and culture, including *Remembering America: A Voice From the Sixties*; *Promises to Keep: A Call for a New American Revolution*; and *The Hinge of the World*.

David M. Kennedy is the Donald J. McLachlan Professor of History at Stanford University and a prolific author whose scholarship spans a wide range of historical subjects. With over ten books and numerous articles to his credit, Professor Kennedy has been awarded a variety of honors and awards, including the 2000 Pulitzer Prize for his comprehensive history of the Great Depression, the New Deal and World War II, *Freedom from Fear: The American People in Depression and War, 1929-1945*. Professor Kennedy is also co-author of *The American Pageant, a History of the Republic*, which is widely used as an undergraduate and high school advanced-placement course textbook.

David McCullough is a well-known biographer, author, historian and scholar. He has written six biographies, including the 1993 Pulitzer Prize-winning, best-selling biography, *Truman*. In addition to the Pulitzer Prize, Mr. McCullough has received several other awards for his contributions to historical scholarship. Mr. McCullough also is active in the historical scholarly community. He serves as the president of the Society of American Historians and is a founding member of Protect Historic America.

Jack N. Rakove is a Professor of Political Science and the William Robertson Coe Professor of History and American Studies at Stanford University. Professor Rakove has written several books on the early American Republic, its politics and political figures, including the biography *James Madison and the Creation of the American Republic*. In 1997, Professor Rakove received the Pulitzer Prize in history for his best-selling book *Original Meanings: Politics and Ideas in the Making of the Constitution*. In addition to his teaching activities at Stanford and as a visiting professor at New York University School of Law, Professor Rakove is an active member of the American Historical Association, the Organization of American Historians, the Society for Historians of the Early American Republic and the Institute of Early American History.

Gordon S. Wood is an historian, author and Professor of History at Brown University, where he has been a faculty member since 1969. Professor Wood also has taught at Harvard University, the College of William and Mary, the University of Michigan and Cambridge University. He is the author of more than 50 publications, including *The Creation of the American Republic*, for which he won the Bancroft Prize in history and the John H. Dunning Prize. In 1993, Professor Wood received the Pulitzer Prize for his book *The Radicalism of the American Revolution*. Professor Wood is a past president of the Society for Historians of the Early American Republic, and he serves on the Board of Trustees for Colonial Williamsburg, Tufts University and the National Council for History Education.

* * * *

As historians, political commentators and authors, *amici* have devoted much of their professional energies to developing, interpreting and analyzing the historical record of this country. As researchers and scholars, *amici* rely heavily on, and the quality of their work is dependent upon, the availability, reliability, accessibility and comprehensiveness

of the nation's electronic repository of back issues of newspapers, magazines, journals and other periodicals. For these reasons, *amici* submit this brief to assist the Court's understanding of the practical effect of the issues at stake in this case.

SUMMARY OF ARGUMENT

The Second Circuit has held that publishers and their licensees cannot lawfully include works of freelance authors who have not explicitly granted the right to publish their individual contributions in electronic libraries or copies of the publishers' collective works. The potential liabilities represented by the lawsuits brought in the wake of the Second Circuit's decision will lead the nation's publishers and their licensees to avoid the risk of copyright infringement liability by deleting freelance contributions currently included in the nation's electronic archives. In an era when libraries and other collecting institutions are rapidly replacing their print and microform archives of newspapers, journals and other periodicals with searchable, full-text electronic counterparts, this result will have unexpected, unprecedented and irreversible consequences for the integrity and accessibility of the historical record and the progress of historical scholarship. Given the significance of this potential outcome, *amici* urge the Court to weigh heavily the likely consequences of the Second Circuit's decision and reverse the judgment below.

Moreover, as framed by the Second Circuit, the central issue in this case is whether electronic journal, newspaper and periodical archives qualify as "revisions" of the collective works in which the freelance authors' contributions first appeared, and are thus privileged under Section 201 of the Copyright Act. In deciding that the electronic versions of these publications are not privileged, the Second Circuit's heavy reliance on the individually searchable and retrievable

character of electronic archives is misplaced in that these characteristics are shared by analog storage media, long viewed as privileged under Section 201. *Amici* also urge the Court to conclude, as did the district court below, that electronic archives are privileged under Section 201 based on the retention of their editorial selection—the element of most value to historians—regardless of whether exact print arrangement is also retained.

ARGUMENT

I. THE SECOND CIRCUIT'S DECISION WILL HAVE THE UNPRECEDENTED AND UNDESIRABLE TWO-FOLD EFFECT OF THREATENING THE COMPLETENESS AND INTEGRITY OF THE NATION'S ELECTRONIC ARCHIVES, AND DECREASING ACCESS TO CONVENIENT, COST-EFFICIENT, COMPREHENSIVE ELECTRONIC INFORMATION RESOURCES.

The impact of digital technology on contemporary society and culture is ubiquitous and ever expanding. For historians, researchers, scholars and students in countless disciplines, the comprehensive, searchable, full-text journal, periodical and newspaper database has become an irreplaceable and priceless resource. The advantages of digital storage and retrieval technology in terms of accessibility, efficiency, reliability and comprehensiveness as compared to traditional analog media (*i.e.*, hard copy bound volumes, microfilm and microfiche) are apparent, and have resulted in the proliferation of electronically available full-text archival resources. These advantages, coupled with the inefficiencies and costs associated with maintaining parallel analog collections of the same archival materials, have led collecting institutions throughout the nation (both big and small) to

reduce significantly their investments in, and reliance on, traditional analog means of information storage and retrieval.

The Second Circuit's decision in this case threatens both the integrity of this nation's historical record and the public's access to it. As a result of the Second Circuit's decision, and contrary to common custom and practice in existence since the advent of electronic media, publishers and their licensees, including but not limited to petitioners, cannot lawfully include past, current or future contributions of freelance authors without first explicitly obtaining rights for further electronic archival publication of their respective contributions. As a direct consequence of the likely expense and practical difficulties of locating and negotiating with individual freelance authors (or their heirs/assigns), publishers will opt to erase the contributions of freelance authors currently included in full-text electronic libraries rather than risk liability for infringement.

A. Electronic Journal, Newspaper and Periodical Archives Provide Unsurpassed Benefits to Historians and Scholars and Thus Have Become Indispensible Research Tools.

The record of our time, as well as that of the past generation, has been and will increasingly become digitized.[2] Before the advent of digital research tools, scholars and historians were dependent principally on index-based

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[2] *See* Martha E. Williams, *Highlights of the Online Database Industry and the Internet: 2000, in* Proceedings of the 21st Annual National Online Meeting 1 (Martha E. Williams ed., 2000) ("Looking at the growth in databases, producers of databases, and vendors of database services over the time period from 1975 through 1999, the databases have grown by a factor of 39 . . . . The number of records contained in the databases has grown disproportionately. In 1975 the 301 databases contained about 52 million records. The 11,681 databases in 1999 contained nearly 12.86 *billion* records for a growth by a factor of 242.") (emphasis added).

systems, such as the *Readers' Guide to Periodical Literature* and its counterparts in countless disciplines, to access original source materials.[3] The researcher invariably began a given project by using the traditional, rigid information access points—namely, title, author and subject fields. After carefully parsing an index and identifying a seemingly relevant reference, the researcher was required physically to retrieve, if possible, or to request through interlibrary loan, if necessary, each and every relevant reference in cumbersome hard copy or microform format. Using these traditional analog tools, even the most straightforward projects focusing on a single publication (*i.e.*, a periodical, journal or newspaper) often required a significant investment of time and patience, often necessitating repeated reference to printed indices, as well as frequent changing of reels or fiche on reading machines.[4] These efforts were exponentially more complicated and burdensome when research, as is typically the case, required consideration of numerous titles, across a multitude of time periods.

With the advent of electronic libraries such as NEXIS, WESTLAW, Dow Jones Interactive and Dialog, a research project that, through the process described above, would have taken a researcher hours, days or more, can now potentially be completed in a matter of minutes. Searchable, comprehensive, full-text databases permit researchers to

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[3] *See* Vibiana Kassabian & Julie M. Still, *Selecting Full-Text Undergraduate Periodicals Databases*, EContent, Dec. 1, 1999 ("A long time ago, in a galaxy far, far away, the friendly but serious . . . librarians at a good undergraduate library could purchase a set of the Wilson indices—*Readers' Guide*, *Social Sciences Index*, *Humanities Index*, *Business Periodicals Index*, *Biological and Agricultural Index*, and *Applied Science and Technology Index*—and feel they were providing their students with solid, well-rounded access to the major periodical literature of various fields.").

[4] *See* David Beasley, *How to Use a Research Library* 133 (Oxford University Press 1988).

review quickly and efficiently hundreds, if not thousands, of print publications for the most detailed and minute references with a few keystrokes. Moreover, these technologies free the researcher from the inherently limited index systems, the integrity of which are entirely dependent on the judgment and perception of the individuals charged with characterizing and describing the underlying content. Full-text archives of a relevant publication for a specified time period provide scholars and researchers with direct access to the universe of potentially applicable source material, and the ability to parse it with a level of detail and at speeds that are simply not possible using traditional, index-based research tools and manual review. In contrast to analog research methods, the utility of the electronic copies and libraries is limited only by the researcher's ability to formulate an effective search. Indeed, with the advent and growth of the Internet and its billions of pages of information, electronic search and retrieval systems are likely to continue to improve dramatically.

The efficiency, accuracy, reliability, comprehensiveness and immediacy of access offered by searchable full-text digital archives are but a few of the benefits historians and other researchers have reaped from the advancement in the technology of information. Perhaps of equal significance is the fact that digital periodical, newspaper and journal archives, regardless of where they are physically housed, can be accessed from any location where the appropriate technology is available.[5] Moreover, these materials can be accessed by countless people simultaneously at any time.[6]

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[5] *See Commission on Physical Sciences, Mathematics, and Applications, National Research Council, LC21: A Digital Strategy for the Library of Congress* (2000) 3-3 [hereinafter *Library of Congress Report*].

[6] *Id.* at 3-4.

B. Digital Technology is Increasingly Replacing, Rather Than Supplementing, Traditional Methods of Recording and Accessing the Nation's Historical Record.

Few will deny that the primary locus, or at least the starting point, of almost any historical research project today (and for many years now) has migrated from the physical collections of libraries and archives to the desktop computer. Indeed, through digitization, the concept of "library" has been transformed from a "place" to a process of information management and collection.[7] As discussed further in Section II below, the fundamental process of historical research remains the same, however, whether the historian is relying on traditional analog or digital research tools. In either case, the quality of the research is ultimately dependent on the skill of the researcher and the comprehensiveness and accessibility of the underlying source material.

Although traditional archives and libraries comprised of analog materials always will remain indispensable research tools, they no longer are the primary research tools. During the last century, those charged with overseeing the warehouses of our nation's collective memory, namely, the nation's research libraries and archives, have struggled to preserve the materials that comprise their collections.[8] To this end, libraries and other collecting institutions have for

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[7] *See* Richard C. Rockwell, *Gateway Library: A View from the Periphery, in* Gateways to Knowledge 109 (Lawrence Dowler ed., 1997).

[8] *See* Gay Walker, Jane Greenfield, John Fox and Jeffrey S. Simonoff, *The Yale Survey: A Large-Scale Study of Book Deterioration in the Yale University Library*, College and Research Libraries, Mar. 1985, at 111-12 (estimating that, as of 1985, more than six million volumes of the collections of the Library of Congress had deteriorated to such an extent that they could not be given to users without risk of irreparable damage, and suggesting that, at the New York Public Library, as much as half of the collection had reached a similarly advanced state of disintegration) [hereinafter *Yale Report*].

decades relied upon microform media based on antiquated technology developed largely in the 1930's.[9] However, like the print collections they were developed to supplement and preserve, microform media are also plagued by equally vexing and decay-hastening challenges exacerbated by factors including poor storage conditions, overuse, and flaws in chemical composition or manufacture.[10] For certain rare or fragile subject matter, digital media may offer the only viable means of salvaging materials for future generations.[11]

In recognition of the limitations of analog storage technology, the efficiencies inherent in managing information digitally, as well as the associated physical space and potential cost savings, libraries and archives have been at the forefront of employing digital technology to collect, store and preserve the historical record in its myriad forms. As a consequence, the acquisition policies and infrastructure of our nation's libraries and archives have undergone a significant transformation. Libraries and archives maintain parallel information systems in traditional print media and electronic forms less and less frequently.[12] Faced with the choice, the

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[9] *See* Paul Wilson, *Historical Perspectives on the Use of Microfilm in Libraries and Archives, in* Preservation Microfilming – Does it Have a Future?/Proceedings of the First National Conference of the National Preservation Office 46 (National Library of Australia, 1995).

[10] *See Yale Report, supra* note 8, at 111; s*ee also* Kevin Fagan, *Battling to Preserve Remnants of History: Newspaper Archives Expensive and Complex*, S.F. Chronicle, Nov. 2, 2000, at A17 ("Historians estimate that as much as 30 percent of many microfilm collections are degraded so badly by insects, worn chemicals and overuse that they are near ruin.").

[11] *Library of Congress Report, supra* note 5, at 4-9, 6-2.

[12] *See* Eli M. Noam, Will Books Become the Dumb Medium?, Keynote Address to the Annual Convention of Educom (Oct. 27, 1997), *in* Educom Review, Mar./Apr. 1997, at 21 ("Comprehensive library collections have become unaffordable. But at the same time, electronic alternatives have become powerful in storage, broad-ranging in content and efficient in

digital alternative, rather than the traditional print alternative, is more commonly selected.[13] Indeed, some observers predict that print media journal/periodical storage and retrieval systems will be the exception rather than the rule in the not-too-distant future.[14] Already, for many researchers, electronic archives represent the sole repository of comprehensive historical information on their topic of interest.[15]

C. The Second Circuit's Decision Will Have the Predictable Effect of Irreparably Undermining the Integrity of the Nation's Electronic Archives and the Progress of Historical Research and Scholarship.

In an era when print archives of newspapers, journals and other periodicals are being rapidly replaced by electronic counterparts, the Second Circuit's decision will have the practical effect of dramatically and irreparably undermining the integrity of the historical record by limiting access to information and increasing the burdens on, and the costs of, scholarship.

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retrieval. Therefore, libraries are gradually shifting from investment in the physical presence of information to the creation of electronic access. Soon the combination of laptop and phone line will serve just as well—anywhere, anytime.").

[13] *See* Katie Hafner, *Books to Bytes*: *The Electronic Archive*, N.Y. Times, Apr. 8, 1999, at G1.

[14] *See* Tracy Primich, *Electronic-Collections in the Age of the Traditional Library*, EContent, Apr. 1, 2000, at 65 (quoting the *1994 California State University Strategic Plan for Libraries* which sets as a goal the transformation of "expensive journals in high-use areas into their electronic equivalents as early as is financially feasible, but certainly within the next three to five years," ultimately predicting that the state university library system will "get out of the business of acquiring print-based journals altogether").

[15] *See Library of Congress Report*, *supra* note 5, at 1-17.

If the decision below stands, publishers may not lawfully include in electronic copies or libraries the works of freelance authors who have not explicitly granted the rights for further electronic archival publication of their respective journal, magazine or newspaper contributions. The threat of a tidal wave of lawsuits brought by freelance authors relying on such a holding will force publishers to minimize the risk of liability by prophylactically eviscerating electronic collections of significant materials. From the perspective of *amici*, the potential damage wrought by this rule is inestimable because such "freelance" materials include, among other things, Op-Ed pieces, letters to the editor, and other invaluable contemporary commentary on the people and events of a given point in time.

The certainty of this devastating outcome becomes clear when the practical limitations involved in seeking and clearing freelance authors' rights are considered. *First*, in light of decades of common publishing industry practice, and given the long-standing understanding of publishers that authorization for inclusion of works in archival resources was not required, the publishing industry simply has not maintained the complete and accurate records necessary to seek and secure the permissions mandated by the Second Circuit's decision. Accordingly, many of the authors whose rights may be implicated, or their heirs and assigns, may be difficult, if not impossible, to locate. *Second*, even assuming the respective rights holder(s) can be located, in addition to the practical and administrative burdens associated with attempting to clear rights retroactively, the aggregate costs of paying individual rights holders for the necessary permissions to republish their respective contributions in electronic form either will be passed on to individual and institutional end users, or may simply be prohibitive, particularly for the publishers of small and/or specialized academic journals. *Third*, in terms of prospective effect, the Second Circuit's decision is no less damaging. Although it may be possible for

publishers to secure in advance the necessary rights from freelance authors to publish back issues of newspapers and other periodicals in their entireties in electronic form, it is equally possible that freelance authors may deny granting such permissions, preferring instead that their individual works not be included in electronic archives regardless of the fees offered by the publisher.

The omission of these materials from electronic collections, for any reason on a large scale or even an occasional basis, undermines the principal benefits that electronic archives offer historians—efficiency, accuracy and comprehensiveness. For the scholar, the uncertainty engendered by an incomplete archive presents a grave threat to the quality and completeness of historical scholarship, particularly where the gaps in coverage are not apparent or even detectable.

Faced with the prospect of unidentifiable gaps in coverage in the nation's electronic archives, and in order to guarantee thorough and accurate research, historians and researchers will, by necessity, be driven back to physical collections of libraries and archives to utilize, to the extent they now exist, the obsolete and inherently limited print-based indices and other analog information-locating tools of prior generations. In light of the trends in library acquisition in favor of electronic media, however, researchers will return to a materially depleted analog universe, with a substantial portion of the historical record simply unavailable or, if available, difficult, costly and inconvenient to access. Against such a backdrop, and in view of increasing financial constraints on research libraries and archives, it is highly unlikely that all but a select few collecting institutions will be able consistently to purchase electronic *and* analog versions of critical resources, with those that do likely being forced to pass on the costs to downstream users. Moreover, because of the fundamental shift in favor of electronic media among the nation's libraries, archives and research institutions, it may

simply be too late to return to analog approaches as the principal means of information storage and retrieval. The vast majority of libraries and archives will, therefore, be left with an unenviable choice between facilitating access and providing complete access to critical resource materials.

Amici respectfully submit, therefore, that the Second Circuit's decision will have the unprecedented and undesirable two-fold effect of threatening the completeness and integrity of the nation's electronic archives, and decreasing access to convenient, cost-efficient, comprehensive electronic information resources available to historians, scholars and researchers, as well as the public at large. In reaching its decision, the Court should weigh heavily the likely consequences of the Second Circuit's decision to the integrity of our nation's collective historical record and the progress of scholarship.

II. THE SECOND CIRCUIT'S FOCUS ON END USERS IN DETERMINING WHETHER ELECTRONIC ARCHIVES QUALIFY AS "REVISIONS" UNDER SECTION 201 IS INCONSISTENT WITH THE PRACTICAL REALITIES INHERENT IN THE PROCESS OF RESEARCH, AS WELL AS LONG-STANDING PUBLISHING INDUSTRY ASSUMPTIONS REGARDING THE PERMISSIBILITY OF TRADITIONAL, ANALOG MEANS OF PERIODICAL, NEWSPAPER OR JOURNAL STORAGE AND RETRIEVAL.

As framed by the Second Circuit, the central issue in this case is whether electronic journal, newspaper and periodical archives are "revisions" of the specific collective works in which the freelance authors' contributions first appeared. In short, if the electronic archives qualify as revisions of a given edition or issue of a periodical or newspaper, the reproduction and subsequent distribution of respondents' individual articles

in electronic archival form, or otherwise, is privileged under Section 201 of the Copyright Act.

Amici urge the Court to reject the Second Circuit's heavy reliance on the individual searchability and retrievability of the electronic archives and find, instead, that these characteristics, which are shared by analog storage media, long viewed as privileged under Section 201, are of no moment in determining whether electronic archives are similarly privileged under the Copyright Act. From the perspective of *amici*, the distinction between electronic libraries and their analog counterparts is simply one of medium, not one of function. Moreover, one of the principle characteristics of the original collective work in which such freelance contributions were published—*i.e.*, the publisher's selection of that article for inclusion in a given periodical, newspaper or journal—is no less evident in the electronic archives at issue in this case than in traditional forms of storage and retrieval.

The Second Circuit's approach to deciding the central issue in this case appears to rest, in large measure, on the ability of end users to access particular articles according to individualized search criteria "unrelated to the particular edition in which the articles first appeared."[16] Implicit in the Second Circuit's holding, however, is the suggestion that the ease of access to individual articles offered by electronic media, at least as contrasted with traditional analog forms (*i.e.*, microfilm/fiche or hardcopy bound volumes), renders electronic archives somehow less deserving of the privilege afforded by the Copyright Act.

Amici readily acknowledge that electronic research tools represent a quantitative advance in historians' and other scholars' ability to access invaluable source materials. *Amici*

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[16] Opinion of the United States Court of Appeals for the Second Circuit Dated and Decided Sept. 24, 1999 and Amended Feb. 25, 2000, 206 F.3d 161, 169.

respectfully submit, however, that irrespective of the medium in which these materials are stored, the process of research, *indeed the primary goal of research*, is to identify and retrieve individual articles and source materials addressing a particular topic of interest. In this respect, the Second Circuit's acknowledgment of the value of individual articles, from the end user's perspective, would appear to be equally applicable to traditional microform archives, as well as archives of bound volumes of periodicals and journals. Moreover, if taken to its logical extreme, this reasoning would undermine a fundamentally acknowledged view, as well as decades of publishing industry practice, based on the understanding that microform replicas are privileged under Section 201.[17]

Indeed, from the historian's perspective, and to the extent the end user's perspective is relevant to the legal issue presented in this case, the focal point of research has always been, and will always be, the retrieval of individual articles, regardless of the medium in which these materials are maintained. This point could not be more succinctly and clearly illustrated than in the following comments of historian Douglas Brinkley,[18] describing the process of biographical research and the value of contemporary newspaper, journal and magazine archives to the work of historians:

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[17] *See U.S. News and World Report Pulls Some Content From Microform Over Copyright Concerns*, Library Journal Academic Newswire, Aug. 29, 2000 (reporting that microform distributor Bell & Howell recently notified library subscribers that *U.S. News and World Report* would omit materials in which the publisher does not hold the copyright from future microform editions of its publication until the "copyright issues have been resolved").

[18] Professor Brinkley is the Director of the Eisenhower Center for American Studies at the University of New Orleans and the author of award-winning biographies of Jimmy Carter and Franklin D. Roosevelt.

> As an historian, when I want to write a biography, if I'm going to write a biography of Bill Clinton, the first thing I would do would be to index *The New York Times*. I would work through microfiche and get any time Bill Clinton's name ever appeared in *The New York Times*. I'd get a copy of that. So, you'd have boxes of files. So for each month, here's Clinton this month. There you have the kind of whole first draft. You then would fill that in with oral history interviews and . . . documentary evidence . . . and with some other obvious books or articles from *Foreign Affairs* or *Foreign Policy* or *The New Yorker*, or the like and you'd start getting your first biography of Bill Clinton. Somebody will do that. My colleague, Steve Ambrose, did that with Richard Nixon and produced three volumes, indexing *The New York Times* and having that as his time line.[19]

As Professor Brinkley's observations aptly illustrate, whether source materials are accessed through electronic archives *or* microfilm, microfiche or bound volumes, the fundamental process of historical research remains constant. When relying upon analog media, historians access source materials using subject indices to retrieve particular articles responsive to their individualized search criteria. Full text, searchable digital archives are used by historians in precisely the same manner for the same purposes. Electronic archives differ from their analog counterparts only in the ease and efficiency with which they enable historians to compile and organize, in the words of Professor Brinkley, the "first draft of history."[20]

Professor Brinkley's observations also demonstrate another equally important threshold consideration relevant to the research process, which appears to be absent from the

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[19] *Panel Discussion: The Observer's View (D. Brinkley, M. Frankel, H. Sidey)*, White House Historical Association (Nov. 16, 2000) (C-SPAN Archives No. 160577).

[20] *Id.*

Second Circuit's analysis. As the district court recognized below, from a researcher's perspective, the value of any article ultimately retrieved is derived, in large part, not only from the content of that article, but also from the fact that a publisher of particular note, reputation, political persuasion or other relevant characteristic selected that article for inclusion in a specific issue of its publication. The publisher's selection of that freelance contribution is retained and continues to be as relevant in the electronic archives as in the original publication. This point was obscured below by the court of appeals' focus on the fact that, from the end user's perspective, electronic archives may, in some instances, display individual articles separately from other materials included in the original collective work.

The Second Circuit's misplaced emphasis on the individually searchable and retrievable character of electronic archival materials as determinative of the "revision" issue rests upon an implicit distinction between analog and electronic research tools that is simply not supported by the practical realities and common practice of *amici*, or end users generally. *Amici*, therefore, urge the Court to conclude, as did the district court below, that electronic archives constitute permissible revisions under Section 201 even where, from the end user perspective, an electronic version may not retain the exact arrangement of the original print version of a given issue of a newspaper, periodical or journal, but does reflect the publisher's selection of that article.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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